INDEX

	Page
Statement of jurisdiction	1
Dates of judgment and application for appeal	1
Opinion below	2
Question presented	2
Statutes involved	2
Statement	2
Argument:	
This Court has jurisdiction of the appeal	4
Conclusion	7
Appendix	8

CITATIONS

Cases:	
United States v. *Birdsall*, 233 U.S. 223	6
United States v. *Heinze*, 218 U.S. 532	7
United States v. *Keitel*, 211 U.S. 370	7
United States v. *Mescall*, 215 U.S. 26	7
United States v. *Nixon*, 235 U.S. 231	7
United States v. *Patten*, 226 U.S. 525	6
United States v. *Ramsey*, 271 U.S. 467	7
Statutes:	
Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682)	8
Revenue Act of 1928, c. 852, Sec. 146, 45 Stat. 791, 835	9

In the Supreme Court of the United States

OCTOBER TERM, 1933

No. 985

UNITED STATES OF AMERICA, APPELLANT

v.

JACOB TROY

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

STATEMENT OF JURISDICTION

In compliance with Rule 12 of this Court, as amended, appellant submits herewith its statement showing the basis of this Court's jurisdiction in the above-entitled cause.

DATES OF JUDGMENT AND APPLICATION FOR APPEAL

The judgment of the District Court was entered February 22, 1934. An application for appeal was filed March 22, 1934, and allowed March 22, 1934.

OPINION BELOW

The opinion of the District Court is found at pages 14–16 of the record.[1]

QUESTION PRESENTED

Whether the judgment of the District Court quashing the indictment on the ground that it was defective in that it failed to allege that the appellee was *under a duty to file the corporate income tax return,* the filing of which was alleged to have constituted the offense, was "based upon the * * * construction of the statute upon which the indictment is founded" within the meaning of the Act of March 2, 1907, c. 2564, 34 Stat. 1246.

STATUTES INVOLVED

These will be found in the Appendix.

STATEMENT

On June 7, 1933, appellee was indicted in the United States District Court for the Middle District of Pennsylvania, under Section 146 (b) of the Revenue Act of 1928, *infra,* the indictment charging that appellee, as president of the Troy Oil Company, Inc., unlawfully, wilfully, and knowingly attempted to defeat and evade a large part, to-wit, $4,429.08, of the tax due upon the net income of $40,722.56 of the said corporation for the calendar

[1] All references to the record are to the pages of the certified unprinted record prepared by the Clerk of the District Court and on file with the Clerk of this Court. The record has not yet been printed.

year 1929, by making and filing an income tax return for the corporation, which was prepared and sworn to by appellee, stating that the net income of the corporation was $3,458.14, upon which the tax was $50.40. (R. 2–6.)

A petition for a rule to show cause why the indictment should not be quashed was filed on October 12, 1933 (R. 7–8), on the grounds that (R. 7):

> The indictment is defective because it fails to aver that Jacob Troy was under a duty to perform the act in respect of which there was a violation charged of the Act of Congress of May 29, 1928.
>
> The indictment is defective in that it fails to set forth that the defendant was under a duty to perform the act in respect of which the violation occurred and in the absence of this averment the indictment fails to set forth facts showing prima facie, a commission of the crime charged in the indictment.

The rule was granted by the District Court (R. 9), and on February 22, 1934, it was made absolute and the indictment was quashed. (R. 14–16.) A certificate of the presiding judge dated March 23, 1934, stated the basis of the court's decision as follows (R. 19):

> Now, March 22, 1934, it is certified that the order and judgment in the above-entitled cause made and entered, quashing the indictment, was based upon a construction of Section 146 of the Revenue Act of 1928, c. 852, 45 Stat. 791, (the statute upon which the indictment was founded), my construc-

> tion of said section being that it is essential to the existence of the crime of wilful attempt to evade or defeat the tax that the defendant shall have been under a duty to perform the act in respect of which the violation charged occurred, which duty should be alleged in the indictment.

Petition for direct appeal to this Court was presented and allowed on March 22, 1934. (R. 17.) On April 2, 1934, appellee filed with the District Court a motion to dismiss the appeal on jurisdictional grounds, and also a statement making against the jurisdiction of this Court.

ARGUMENT

THIS COURT HAS JURISDICTION OF THE APPEAL

The Act of March 2, 1907, *infra*, provides:

> A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a *decision or judgment quashing*, setting aside, or sustaining a demurrer to, *any indictment*, or any count thereof, *where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.* (Italics ours.)

The indictment in this case is founded upon Section 146 of the Revenue Act of 1928, *infra*. Subsection (b) thereof provides in part as follows:

> * * * any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony * * *.
>
> Subsection (c) provides:
>
> The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

Thus the narrow question presented is whether the judgment of the District Court quashing the indictment and dismissing the case was based upon a construction of this statute.

From the opinion of the court (R. 14–16) it clearly appears that the court's action was predicated upon the view that it does not constitute a violation of the above statute for a president of a corporation to attempt to evade and defeat the payment of the corporate tax by the filing of a false return, *unless such president is under a duty to file such corporate return.*

It is the Government's position that such construction of the statute is erroneous. The question as to which view is correct depends upon the proper construction to be placed upon Section 146, *supra.* It follows that the order of the court was "based upon the * * * construction of the statute * * * upon which the indictment is founded", within the meaning of the Act of March 2, 1907,

c. 2564, 34 Stat. 1246. Any possible doubt that might exist with respect to this question is removed by the certificate of the District Judge (R. 19), wherein he certifies:

> * * * that the order and judgment * * * quashing the indictment * * * was based upon a construction of Section 146 of the Revenue Act of 1928, * * * my construction of said section being that it is essential to the existence of the crime of wilful attempt to evade or defeat the tax that the defendant shall have been under a duty to perform the act in respect of which the violation charged occurred, which duty should be alleged in the indictment.

As stated by this Court in *United States* v. *Birdsall*, 233 U.S. 223, 230:

> As the District Court held that the acts charged did not fall within the condemnation of the statute, the court necessarily construed the statute and the cases are properly here.

In *United States* v. *Patten*, 226 U.S. 525, this Court stated (p. 535):

> The court could not have decided, as it did, that the acts charged are not within the condemnation of the statute without first ascertaining what it does condemn, which, of course, involved its construction. Indeed, it seems a solecism to say that the decision that the acts charged are not within the statute is not based upon a construction of it.

See also *United States* v. *Keitel,* 211 U.S. 370, 386; *United States* v. *Ramsey,* 271 U.S. 467, 469; *United States* v. *Nixon,* 235 U.S. 231, 235; *United States* v. *Heinze,* 218 U.S. 532, 540; *United States* v. *Mescall,* 215 U.S. 26, 31.

CONCLUSION

The Government therefore submits that this Court has jurisdiction of the appeal, and that the motion to dismiss should be denied.

Respectfully submitted.

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MAY 1934.

APPENDIX

STATUTES INVOLVED

Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U.S.C., Title 18, Sec. 682):

> A writ of error may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to wit:
>
> From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded.
>
> From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded.
>
> From the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy.
>
> The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.
>
> Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: *Provided,* That no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant.

Revenue Act of 1928, c. 852, 45 Stat. 791, 835:

SEC. 146. PENALTIES.

* * * * *

(b) Any person required under this title to collect, account for, and pay over any tax imposed by this title, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

(c) The term "person" as used in this section includes an officer or employee of a corporation or a member or employee of a partnership, who as such officer, employee, or member is under a duty to perform the act in respect of which the violation occurs.

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